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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Promotion of a democratic and equitable international order

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the fifth report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas, submitted in accordance with Assembly resolution 70/149.

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Report of the Independent Expert on the promotion of a democratic and equitable international order

Summary

The report focuses on impacts of taxation on human rights and explores the challenges posed to the international order by widespread tax avoidance, tax evasion, tax fraud and profit shifting, facilitated by bank secrecy and a web of shell companies registered in tax havens. The Independent Expert calls for resolute action by the international community, including through the creation of a United Nations tax cooperation body, the adoption of a United Nations tax convention, the phasing out of tax havens, the revision of the Guiding Principles on Business and Human Rights to include the obligation of corporations to pay their fair share of taxes and the adoption of a financial transactions tax.

I. Introduction

1. Since the early 1970s the General Assembly has adopted resolutions on a new international economic order.[1] After the turn of the millennium, the Assembly began to address the promotion of a democratic and equitable international order.[2] In its resolution 70/149, the Assembly affirmed that the responsibility for managing worldwide economic and social issues, as well as threats to international peace and security, must be shared among the nations of the world and should be exercised multilaterally, and that efforts to make globalization fully inclusive and equitable must include policies and measures at the global level that corresponded to the needs of developing countries and countries with economies in transition and were formulated and implemented with their effective participation. The Assembly underlined the importance of a global and inclusive post-2015 development agenda for the promotion of a democratic and equitable international order and of the establishment of a new international economic order based on equity, sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social systems, which would correct inequalities and redress existing injustices and make it possible to eliminate the widening gap between the developed and the developing countries.

2. A peaceful and just world order has long been a concern of the international community, and in particular of the Commission on Human Rights,[3] the Subcommission on Promotion and Protection of Human Rights,[4] the Human Rights Council[5] and its special procedures and Advisory Committee,[6] the United Nations Conference on Trade and Development (UNCTAD),[7] as well as intergovernmental organizations including the Organization for Economic Co-operation and Development (OECD), all of which have provided invaluable reports. Alas, seldom do their recommendations result in thorough going reform of international financial rules or investment regimes. Cosmetic changes are not enough. What is needed is bold and concerted action by Governments, not more diagnoses.

3. Notwithstanding the hard-law quality of the international human rights treaty regime, there are no adequate enforcement mechanisms. The reality is that "the economy" seldom takes into account the needs of destitute people but reflects the interests of elites, who mostly oppose reforms. Pursuant to the Charter of the United Nations, the Organization has the mandate to change the rules so that human rights, including the right to development, take priority over economic mantras. At various United Nations summits, in the United Nations Millennium Declaration, in the Sustainable Development Goals, at the twenty-first session of the Conference of the

[1] Most notably resolution 3201 (S-6), containing the Declaration on the Establishment of a New International Economic Order, and resolution 3281 (XXIX) containing the Charter of Economic Rights and Duties of States.

[2] See, for example, resolutions 55/107, 56/151, 57/213, 61/160 and 63/189.

[3] See Commission resolutions 2004/64 and 2005/57.

[4] Report on the realization of economic, social and cultural rights by the Special Rapporteur, Danilo Türk (E/CN.4/Sub.2/1992/16).

[5] See, for example, resolution 28/5.

[6] Report on the issue of the negative impact of corruption on the enjoyment of human rights (A/HRC/23/9).

[7] Annual world investment reports and trade and development reports. See in particular http://unctad.org/en/PublicationChapters/tdr2014ch7_en.pdf; and http://unctad.org/en/PublicationChapters/wir2015ch5_en.pdf.

Parties to the United Nations Framework Convention on Climate Change, held in Paris in December 2015, and at the United Nations conferences on human settlements,[8] States rhetorically recognized the need to reorient the economy; but pledges and soft law rarely achieve results, and even legally binding treaties do not deliver unless there is transparency, accountability and enforcement. The announcement by the Group of Twenty (G-20) in 2009 that the "era of bank secrecy was over" has been followed by some good initiatives, notably the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes[9] and the development of the Standard for Automatic Exchange of Financial Account Information (the Common Reporting Standard); but these have only made a dent on tax havens.[10]

4. The current international economic order manifests growing inequalities among States and within States. Whereas the United Nations should determine the world agenda, the economic order is not set by the General Assembly but by major economic powers, by transnational corporations and by three international organizations — the World Trade Organization, the World Bank and the International Monetary Fund (IMF) — none of which have been incorporated into the United Nations system.[11] It is time to harmonize the policies of these three organizations with the purposes and principles of the Organization and to ensure that their actions do not frustrate the implementation of United Nations programmes.

5. There are systemic obstacles to changing this situation, among them asymmetrical power relationships; unfair taxation; lack of transparency and accountability; unjust enrichment; widespread corruption;[12] bribery; embezzlement; secrecy; collusion among lobbies, accounting and consulting firms and law firms; and vested interests of domestic and transnational corporations. These should be met by stricter implementation of domestic and international penal law.[13] This has a detrimental impact on human rights as it deprives States of resources needed to fulfil their human rights treaty obligations concerning the administration of justice, maintenance of infrastructures, health care, education and housing, and prevents them from implementing pledges for the Sustainable Development Goals and for environmental protection pursuant to the Paris Agreement.

6. The Independent Expert recognizes that a democratic and equitable international order cannot be achieved without adequate funding. A human rights-based approach to taxation and stricter measures against tax fraud, tax evasion and tax havens are urgently needed because a shortfall in tax revenues handicaps Governments in meeting human rights treaty obligations. Trillions of dollars are needed. As the Independent Expert outlined in his 2014 report to the Human Rights

[8] See http://unhabitat.org/un-habitat-presents-world-cities-report-to-european-audience/.

[9] See www.oecd.org/tax/forum-on-tax-administration/ftajitsicnetwork.htm; www.oecd.org/ctp/bribery-and-corruption-awareness-handbook-for-tax-examiners-and-tax-auditors-9789264205376-en.htm; www.oecd.org/ctp/crime/effective-inter-%20agency-cooperation-report.pdf; www.oecd.org/tax/crime/Oslo-Dialogue-flyer.pd; and http://www.ipsnews.net/2016/08/developing-nations-seek-tax-body-to-curb-illicit-financial-flows/.

[10] See www.theguardian.com/world/2009/apr/02/g20-summit-tax-havens.

[11] Pursuant to Articles 57 and 63 of the Charter. See A/HRC/33/40, para. 63.

[12] The United Nations Convention against Corruption states that "the illicit acquisition of personal wealth can be particularly damaging to democratic institutions".

[13] Ndiva Kofele-Kale, *The International Responsibility for Economic Crimes: Holding State Officials Individually Liable for Acts of Fraudulent Enrichment* (Routledge, 2006) and Sol Picciotto, *Regulating Global Capitalism* (Cambridge, 2011).

Council (A/HRC/27/51), one way of liberating funds is by drastically reducing military expenditures. Another way is by ensuring transparent and accountable fiscal and budgetary policies, so that individuals and corporations pay their fair share of taxes. Tax fraud should be systematically prosecuted and punished, and funds confiscated from organized crime activities, drug trafficking, illicit arms trade, trade in endangered species, etc. should be redirected to human rights programmes. Illicit deposits by kleptocrats must be returned to the countries of origin.[14] A further source of revenue would be through the imposition of a financial transactions tax, which would have the additional advantage of curbing speculation and reducing the volatility of financial markets.[15]

7. In a report submitted to the Human Rights Council at its twenty-sixth session, the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda, focused on fiscal and budgetary policy as a major component of human rights implementation, especially when tackling inequality and generating revenue for sustainable development, poverty reduction, education and job- and infrastructure-creation. Taxation must foster stronger governance, accountability and participation in public affairs. Principles of non-discrimination and equality and the duty of international cooperation and assistance should inform taxation policies at the global and national levels.[16]

8. At the twenty-eighth session of the Human Rights Council, the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky, submitted an interim report on illicit financial flows and the post-2015 development agenda (A/HRC/28/60 and Corr.1). In his final report he observed, rather diplomatically:

> "Financial institutions that facilitate tax evasion and transnational corporations that employ aggressive tax planning strategies must recognize that their actions may have negative human rights impacts. They can demonstrate respect for human rights through appropriate policies and due diligence procedures, through country-by-country reporting, including publishing information about the taxes they pay to each country in which they operate. Similarly, the professionals that make up the tax planning industry, such as lawyers, accountants, bankers and wealth managers, must take responsibility for their contributions to the harms caused by tax abuse" (A/HRC/3161, para. 56).

9. The author of the present report would speak, more pointedly, of white-collar criminality that has enjoyed a high level of anonymity and impunity. Indeed, it is the infrastructure of intermediaries, including tax advisers, law firms, accountants and trust service providers, that facilitates tax evasion and avoidance as well as

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[14] See www.thedailybeast.com/articles/2016/05/03/how-the-kleptocrats-12-trillion-heist-helps-keep-most-of-the-world-impoverished.html. See also Human Rights Council resolution 31/22.

[15] See www.un.org/en/development/desa/news/policy/wess2012.html; and www.bbc.com/news/business-15552412.

[16] "Tax abuse includes tax evasion, fraud and other illegal practices, including the tax losses resulting from other illicit financial flows, such as bribery and money laundering ... . [G]lobally, approximately $3 trillion of government revenue is lost to tax evasion every year ... . In 2011, developing countries lost $946.7 billion owing to illicit financial flows, ... according to OECD more than seven times official development assistance for that year ... . Tax abuse is thus not a victimless practice; it limits resources that could be spent on reducing poverty and realizing human rights, and perpetuates vast income inequality" (A/HRC/26/28 and Corr.1, paras. 58-59).

cross-border illicit financial flows. Every strategy to tackle the intermediaries, euphemistically called "enablers" or "service providers", must be part of the effort to tackle tax evasion.

10. The present report is an interim report on the adverse impacts of unfair fiscal and budgetary policies on the international order, in which the Independent Expert gives due attention to the professional analysis of intergovernmental organizations such as the Geneva-based South Centre and OECD and its Tax Inspectors without Borders initiative,[17] as well as research conducted by civil society organizations including International Bar Association,[18] Global Policy Forum,[19] Global Justice Now,[20] Global Alliance for Tax Justice,[21] Oxfam,[22] Centre Europe-tiers monde,[23] Business and Human Rights Resource Centre,[24] Tax Justice Network,[25] Center for Economic Policy Research,[26] Centre for Economic and Social Rights,[27] Shift,[28] Citizens for Tax Justice,[29] Transparency International,[30] Independent Commission for the Reform of International Corporate Taxation,[31] Global Reporting Initiative,[32] Organized Crime and Corruption Reporting Project,[33] Friedrich Ebert Stiftung,[34] AllianceSud,[35] Comité catholique contre la faim et pour le développement-terre solidaire,[36] Secours Catholique-Caritas France,[37] Plateforme paradis fiscaux et judiciaires[38] and others. The Independent Expert adds his voice to those of the various groups and organizations which have undertaken initiatives in this area and calls on Governments to take urgent action to correct the glaring injustices perpetuated by the systematic avoidance of taxes through tax havens that siphon off trillions of dollars from the economies of many countries, including developing countries.

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[17] See www.oecd.org/tax/taxinspectors.htm.

[18] See www.ibanet.org/LPD/Taxation_Section/Taxes/Publications.aspx.

[19] See www.globalpolicy.org/home/272-general/52850-panama-papers-when-tax-abuse-is-human-rights-abuse.html.

[20] See www.imf.org/en/News/Articles/2015/09/28/04/53/sp011216.

[21] See www.globaltaxjustice.org/, http://www.globaltaxjustice.org/the-world-needs-a-un-global-tax-body-now/; and www.globaltaxjustice.org/wp-content/uploads/2015/02/UN-Tax-Body-Briefing-for-Government-Delegations-with-Logos.pdf.

[22] See www.oxfam.org/en/tags/tax-havens, https://www.oxfam.org.au/wp-content/uploads/2016/06/OXF003-Tax-Havens-Report-FA-WEB.pdf; and www.theguardian.com/world/2016/apr/14/us-corporations-14-trillion-hidden-tax-havens-oxfam.

[23] See www.cetim.ch/wp-content/uploads/Right-t http://cepr.org/o-development.pdf; and www.cetim.ch/wp-content/uploads/report_10.pdf.

[24] See https://business-humanrights.org/en/tax-avoidance-0.

[25] See www.taxjustice.net/topics/inequality-democracy/human-rights/.

[26] See http://cepr.org/, http://cepr.org/active/publications/discussion_papers/dp.php?dpno=8570.

[27] See www.cesr.org/section.php?id=229, http://cesr.org/downloads/Tax_Evasion_ETOs_2014.pdf.

[28] See www.shiftproject.org/article/tax-abuse-business-and-human-rights-issue.

[29] See http://ctj.org/ctjreports/2015/10/offshore_shell_games_2015.php#.V4OtIfl97IU.

[30] See www.transparency.org/glossary/term/tax_haven.

[31] See www.icrict.org/declaration/.

[32] See www.globalreporting.org/Pages/default.aspx.

[33] See www.occrp.org/en/daily/5133-unaoil-leaks-investigation-spotlights-global-oil-industry-bribes-for-contracts-scandal.

[34] See library.fes.de/pdf-files/iez/global/04669.pdf.

[35] See www.alliancesud.ch/en/publications/downloads/5769_alliancesud_news_nr%2079_GzD.pdf.

[36] See http://ccfd-terresolidaire.org/infos/partage-des-richesses/paradisfiscaux/.

[37] See www.secours-catholique.org/actualites/sur-la-piste-des-banques-francaises-dans-les-paradis-fiscaux.

[38] See www.stopparadisfiscaux.fr/.

11. In May 2016 more than 300 leading economists and lawyers appealed to Governments to work for fiscal transparency. Olivier Blanchard, Angus Deaton, Nora Lustig and Thomas Piketty expressed the view that tax havens served no economic purpose, and that they should end. In particular, they called on Governments to adopt global rules requiring companies to publicly report taxable activities in every country in which they operated and to ensure that all territories publicly disclosed information about the real owners of companies and trusts. "As the Panama Papers and other recent exposés have revealed, the secrecy provided by tax havens fuels corruption and undermines countries' ability to collect their fair share of taxes."[39]

12. The Special Adviser to the Secretary-General on the 2030 Agenda for Sustainable Development, Jeffrey Sachs, stated: "Tax havens do not just happen. The British Virgin Islands did not become a tax and secrecy haven through its own efforts. These havens are the deliberate choice of major governments, especially the United Kingdom and the United States, in partnership with major financial, accounting, and legal institutions that move the money".[40]

13. Part of the problem lies in the mantras of market fundamentalism and the belief that financial markets should be deregulated because this ultimately benefits everyone, including the poor. Although no empirical evidence exists to back this up, transnational corporations and the super-rich have succeeded in creating an enabling environment for systematic looting of society. Collusion between the world's biggest banks, specialized law firms, and consulting and accounting firms has led to a global system designed to hide money and avoid taxes by virtue of secretive offshore structures. This is unethical and should be perceived as such by professional associations, law schools and business schools. Yet, instead of prohibiting activities that are clearly *contra bonos mores*[41] and may amount to conspiracy, or even a form of racketeering, States have entered into a kind of self-destructive competition among themselves to see which jurisdiction offers greater

[39] See www.oxfam.org/en/pressroom/pressreleases/2016-05-09/tax-havens-serve-no-useful-economic-purpose-300-economists-tell. See also https://panamapapers.icij.org/. In defence of tax havens, see www.internationalman.com/articles/the-moral-case-for-tax-havens.

[40] See www.theguardian.com/world/2016/may/09/tax-havens-have-no-economic-justification-say-top-economists.

[41] Alfred Verdross, "Forbidden treaties in international law", *American Journal of International Law*, vol. 31, No. 4 (Oct. 1937), pp. 571 ff; A. Verdross, "Les principes généraux du droit et la jurisprudence internationale", *Collected Courses of the Hague Academy of International Law*, vol. 52 (1935), pp. 195-249; Olivier Corten and Pierre Klein, eds., *The Vienna Convention on the Law of Treaties: A Commentary*, Volume I (Oxford University Press, 2011), p. 146; and Robert Kolb, *The International Court of Justice* (Oxford University Press, 2013), p. 81. There is an ethical minimum standard for treaties, and a treaty which subverts *ordre public* or is otherwise *contra bonos mores* is void, e.g., if it prevents the universally recognized tasks of a civilized State such as maintenance of public order, care of the bodily and spiritual welfare of citizens and protection of nationals abroad. Bruno Simma, "The contribution of Alfred Verdross to the theory of international law", *European Journal of International Law*, vol. 6 (1995), pp. 33-54; and Gleider Hernandez, "A reluctant guardian: the International Court of Justice and the concept of 'international community'", *British Yearbook of International Law*, vol. 83, No. 1 (2012). See also Sir Hersch Lauterpact on "overriding principles of international law" in *Yearbook of the International Law Commission 1953*, vol. II (United Nations publication, Sales No. 59.V.4, Vol. II), p. 155; Alexander Orakhelashvili, ed., *Research Handbook on the Theory and History of International Law* (Elgar, 2011); and https://law.wustl.edu/SBA/upperlevel/International%20Law/IntLaw-Mutharika2.pdf.

secrecy facilities. The situation has been a bonanza for lawyers and accounting firms and become toxic to the fiscal health of many countries, particularly since financial globalization expanded in the 1980s and 1990s. The offshore world corrupts and distorts markets and investments, shaping them in ways that have nothing to do with efficiency.[42]

14. Whistle-blowing is one of the most effective methods of shining a light on corruption. Thanks to the revelations of whistle-blowers a public debate on tax havens has started that is providing momentum for legislative changes to abolish secrecy jurisdictions. But whistle-blowers often pay a heavy price. It is in the spirit of a democratic and equitable international order to adopt legislation to protect whistle-blowers and witnesses from reprisals and to provide them with easy-to-access avenues to make disclosures. Transparency International has published a report on whistle-blower protection laws,[43] and a recent study by several institutions entitled "Whistleblower protection laws in G20 countries: priorities for action" analyses the state of whistle-blower protection rules and finds important shortcomings, especially concerning the absence of anonymous channels for employees to discreetly report sensitive information.[44] Luxembourg Leaks ("LuxLeaks"), "SwissLeaks" and the Panama papers lay bare the way that financial secrecy facilitates corruption when individuals and corporations can hide behind layers of anonymous companies, trusts and foundations.

15. In the period following his 2015 report to the General Assembly, the Independent Expert sent communications to States and questionnaires to Governments and intergovernmental organizations, and participated in international conferences, academic symposia and United Nations side events as outlined in his report to the Human Rights Council (A/HRC/33/40).

II. Facts and implications

16. OECD had defined a tax haven as "a country which imposes a low or no tax, and is used by corporations to avoid tax which otherwise would be payable in a high-tax country. ... [T]ax havens have the following key characteristics: No or only nominal taxes; Lack of effective exchange of information; Lack of transparency in the operation of the legislative, legal or administrative provisions."[45] OECD subsequently set up the Global Forum on Transparency and Exchange of Information for Tax Purposes and implemented a rigorous peer review process with ratings to determine compliance with international standards in tax transparency.[46]

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[42] See http://hack.tion.free.fr/mvtsoc/Attac/www.attac.org/fra/toil/doc/oxfam2.htm.

[43] See www.transparency.org/topic/detail/whistleblowing/.

[44] See www.transparency.de/fileadmin/pdfs/Themen/Hinweisgebersysteme/Whistleblower-Protection-Laws-in-G20-Countries-Priorities-for-Action.pdf.

[45] See www.oecd.org/ctp/glossaryoftaxterms.htm. See also www.taxjustice.net/cms/upload/pdf/oxfam_paper_-_final_version__06_00.pdf.

[46] For lists of secrecy jurisdictions, including a list of "uncooperative tax havens", see www.oecd.org/countries/monaco/listofuncooperativetaxhavens.htm. For other lists, see www.imf.org/external/NP/ofca/OFCA.aspx; www.bis.org/statistics/dsd_cbs.pdf; and www.gao.gov/assets/290/284522.pdf.

17. The Whistleblower Justice Network suggests the following definition: "a country (or territory) whose laws make the country attractive as a tax shelter for foreign money".[47]

18. According to Tax Justice Network, there are over 100 "secrecy jurisdictions", a term preferred over tax havens for which there is no definition based on objectively verifiable criteria. The Network's global analysis reveals that there is a spectrum of financial secrecy in most jurisdictions assessed and that what is needed is a reform of the system, rather than looking for "unproblematic" jurisdictions.

19. Also according to Tax Justice Network, an estimated $21-$32 trillion of private financial wealth is located offshore, untaxed or lightly taxed, in secrecy jurisdictions around the world. Estimated revenue losses are on the order of $190 billion annually.[48] According to UNCTAD, this costs developing countries more than $100 billion annually.[49]

20. The Tax Justice Network Financial Secrecy Index ranks jurisdictions according to their secrecy and the scale of their offshore financial activities (see annex). The top three jurisdictions listed in the 2015 index were Switzerland, Hong Kong, China,[50] and the United States.[51] Other high-profile jurisdictions include the United Kingdom of Great Britain and Northern Ireland and its Overseas Territories and Crown Dependencies, Luxembourg, the Netherlands, Belgium, Malta,[52] Cyprus, Singapore, Liberia[53] and Panama.

21. According to Tax Justice Network, illicit cross-border financial flows have been estimated at $1.6 trillion per year, dwarfing the $135 billion devoted globally to "foreign aid". It is estimated that since the 1970s African countries alone have lost over $1 trillion in capital flight, while combined external debts are less than $200 billion. Viewed from this perspective, Africa is a major creditor to the world, but its assets are in the hands of a wealthy elite, protected by offshore secrecy, while the debts are shouldered by populations already suffering from extreme poverty. European countries such as Greece, Italy and Portugal have also endured decades of tax evasion via offshore secrecy.

22. According to University of California, Berkeley economist Gabriel Zucman, tax evasion costs Governments approximately $200 billion annually.[54]

23. According to OECD, the artificial schemes of base erosion and profit shifting (BEPS) result in global corporate income tax revenue losses of $100-$240 billion annually.[55]

[47] See https://whistleblowerjustice.net/what-is-a-tax-haven/

[48] See www.taxjustice.net/cms/upload/pdf/Price_of_Offshore_Revisited_120722.pdf.

[49] See www.taxjustice.net/2015/03/26/unctad-multinational-tax-avoidance-costs-developing-countries-100-billion/.

[50] See www.scmp.com/business/markets/article/1880426/crackdown-caribbean-tax-havens-surprise-boon-hong-kong.

[51] See www.bloomberg.com/news/articles/2016-01-27/the-world-s-favorite-new-tax-haven-is-the-united-states.

[52] See www.independent.com.mt/articles/2016-06-12/local-news/Malta-is-the-EU-s-number-four-corporate-tax-haven-Oxfam-International-6736159237; and www.oxfam.org/en/pressroom/pressreleases/2013-05-22/tax-private-billions-now-stashed-away-havens-enough-end-extreme.

[53] See www.financeuncovered.org/investigations/liberia-americas-outpost-financial-secrecy/.

[54] *The Hidden Wealth of Nations, the Scourge of Tax Havens* (University of Chicago, 2015).

[55] See www.theguardian.com/global-development-professionals-network/2016/may/10/were-losing-240bn-a-year-to-tax-avoidance-who-really-ends-up-paying.

24. According to Oxfam, United States corporations hide at least $1.3 trillion in tax havens.[56] Profit shifting by United States multinationals suggests that about 25-30 per cent of global profits are shifted into jurisdictions with no corresponding real economic activity.

25. Tax havens host a substantial portion of the world's foreign direct investment.[57]

26. Fifty-one of the 68 companies that borrowed money from the World Bank's private lending arm in 2015 to finance investments in sub-Saharan Africa use tax havens.[58]

III. Obstacles and bad practices

27. Euphemisms constitute an obstacle to reform, because subconsciously, many politicians, legislators, business people, investors, transnational corporations, journalists and even the public do not "feel" that business activity and trade can be toxic for the human rights of billions of human beings. They perceive business as always beneficial, and tax manipulators are euphemistically referred to as "legal providers". Many do not immediately see "tax havens" or "shelters" as corruption ports, and endorse dubious forms of "tax optimization" as perfectly "legal", although some forms are borderline activities that would otherwise constitute tax fraud, racketeering or conspiracy. How else can one characterize the collusion of business lobbies, politicians, tax lawyers, banks and accounting and consulting firms in the creation of a thoroughly artificial system with special tax laws, "incentives" and loopholes that serve no economic or job-creating purpose, but allow companies to cheat Governments of tax revenue? The Guiding Principles on Business and Human Rights do not contain any provision concerning the obligation of businesses to pay their fair share of taxes. There is no mention of tax evasion, tax fraud or tax havens. Nor is there even in the commentary of the International Bar Association,[59] as if businesses were exempt from human rights obligations in the field of taxation. Perhaps this obligation could be interpreted in the Guiding Principles under the rubric "due diligence", but it should have merited at least one separate article.

28. Exploitation of loopholes directed by an organized tax avoidance industry dominated by four accounting firms (Deloitte, PricewaterhouseCoopers, KPMG and Ernst and Young), and avidly copied by others, is having a disastrous impact on human rights. As reports have documented, "they are setting the standards to suit themselves ... working in collusion with company executives to boost their rewards by hyping shareholder value at the expense of investment, social interests and long-

[56] See www.theguardian.com/world/2016/apr/14/us-corporations-14-trillion-hidden-tax-havens-oxfam; www.oxfamamerica.org/static/media/files/Broken_at_the_Top_4.14.2016.pdf; and www.taxjustice.net/cms/upload/pdf/oxfam_paper_-_final_version__06_00.pdf. Reportedly, Apple has $181 billion offshore, General Electric $119 billion and Microsoft $108 billion.

[57] See https://tax.network/ddharmapala/what-problems-and-opportunities-are-created-by-tax-havens/.

[58] See www.oxfam.org/en/pressroom/pressreleases/2016-04-11/majority-world-banks-private-investments-go-companies-have.

[59] See https://business-humanrights.org/sites/default/files/documents/IBA_Practical_Guide.pdf; and www.ibanet.org/Article/Detail.aspx?ArticleUid=c9bd50c6-c2b3-455b-b086-a7efbfe1f6a5.

term survival". Not only does this behaviour illustrate an unsophisticated and selfish approach to business driven by short-term profit only, but, most importantly, it severely undermines democracy and the welfare of the people. Depriving them of essential resources for health care, education, security and other basic needs, it has led numerous Governments "to shift taxes away from giant corporations and wealthy elites to labour, consumption and savings, depressing ordinary people's purchasing power and causing economic crises".[60]

29. Another obstacle is a sense of false security that "someone is working to solve the problems", emanating from the fact that organizations like OECD exist. At a meeting in New York in April 2016, a representative of Financing for Development Group, stated: "Rich countries [get] together in a closed room and decide on what they call global tax rules."[61] She noted that the current OECD-coordinated process is "extremely undemocratic" and that the rules disadvantage developing countries. For example, according to OECD rules, when a company operates in more than one country, taxes should generally be paid in the country where the company has its headquarters. This favours OECD member countries, where headquarters are often located, and disadvantages developing countries, where companies perform substantial parts of their operations. To counter this situation, the Group of 77 (G-77) and China, representing 134 Member States, has urged the United Nations to take a greater role in global tax cooperation, arguing that that this would strengthen international cooperation in this field and allow countries, including developing countries, to have an equal say on issues related to tax matters. Unfortunately, this proposal was rejected in the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, which confirmed OECD control over global tax matters. Observers feel that the exclusion of more than 100 developing countries from the opaque rule-making processes is a reason why the global tax system has become so "fragmented, dysfunctional and unfit to meet the needs of the developing world".[62] The recently launched BEPS framework aims at addressing this point.

30. Meanwhile intra-company royalty payments are becoming a preferred vehicle for aggressive tax avoidance. Legislation should be adopted to prohibit this kind of artificial intra-company arrangement, which serves no purpose other than to deprive the State of legitimate tax revenue.[63] The World Economic Forum would be a good place to discuss these issues, but it may be that some of the big players still cherish fiscal paradises and will delay doing away with them.[64]

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[60] Austin Mitchell and Prem Sikka, *The Pin-Stripe Mafia: How Accountancy Firms Destroy Societies* (Association for Accountancy and Business Affairs, 2011). Auditing firms advise transnational corporation and super-rich individuals how to structure their accounts in order to minimize tax and lobby Governments and supranational organizations to keep loopholes open for transnationals and to block transparency, devise new tax avoidance scams, advise Governments on new tax rules to ensure that the privileges of transnationals are preserved or expanded, undemocratically influence the development of tax law, engage in revolving door practices, act as a quasi-legitimate face for tax havens and fund think tanks to frame tax debates in a race to the bottom. See also Jim Cousins, Austin Mitchell and Prem Sikka, *Race to the Bottom: The Case of the Accountancy Firms* (Association for Accountancy and Business Affairs, 2004).

[61] See www.ipsnews.net/2016/04/developing-countries-left-out-of-global-tax-decisions/.

[62] See www.globaltaxjustice.org/the-world-needs-a-un-global-tax-body-now/.

[63] See www.alliancesud.ch/en/publications/downloads/5769_alliancesud_news_nr%2079_GzD.pdf.

[64] See www.ipsnews.net/2005/01/world-economic-forum-corporations-in-search-of-paradise-fiscal-that-is/.

A. Panama papers

31. In April 2016, the International Consortium of Investigative Journalists (ICIJ)[65] released the Panama papers, nearly 12 million leaked documents that detail financial information on shell companies and tax havens by a single law firm in Panama, revealing the tip of an iceberg of tax avoidance, tax evasion and kleptocracy. One may ask how many other law firms in how many other secrecy jurisdictions are doing the same thing. The publication by ICIJ in May 2016 of a searchable database of over 214,488 offshore entities created in 21 jurisdictions, stretching from Nevada to Hong Kong, China to the British Virgin Islands,[66] may provide answers.

32. There has been a convergence of powerful interests working hand in hand to take advantage of any loophole in tax laws and to create dubious entities and shell companies that serve no economic or entrepreneurial purpose; their principal purpose is to hide great fortunes, including those of developing world kleptocrats who have looted their countries.[67] In some cases these entities have served to launder money that has been generated through questionable activities. These practices have contributed to the worsening of economic inequality. The Panama papers are not about Panama, or about the law firm Mossack Fonseca,[68] but about the worldwide network of secrecy jurisdictions.

33. In an answer to the questionnaire on the impact of tax evasion and tax havens on human rights sent by the Independent Expert,[69] OECD stated the following:

> While it's easy to focus on the bad news from the Panama Papers and other leaks, it is important to recognize the good news as well. It is clear from the information that has become available that the steps that the global community has been taking to address transparency of ownership information are starting to work. The figures presented by the ICIJ, for example, show that the number of bearer share companies formed by Mossack and Fonseca has been in decline for some time and had fallen to almost zero in 2015. All of the jurisdictions which were used to create these companies have now either immobilized bearer shares, including Panama itself, which immobilized them in 2015, or, as in the case of Seychelles, eliminated bearer shares entirely. What all this shows is that we are on the right track and that financial centres around the world are responding to the new environment with continued improvements in the area of tax transparency. What remains to be done is to ensure the implementation of the global tax transparency and exchange of information standards in full.

34. Thus far, the consequences of the Panama papers scandal have been remarkably mitigated. Only one Head of Government resigned, the President of Iceland.[70] It appears, as in other situations involving white-collar abuses, that

[65] See https://panamapapers.icij.org/; and www.cesr.org/article.php?id=1834 Center for Economic and Social Rights, when Tax abuse is Human Rights Abuse.

[66] See https://panamapapers.icij.org/blog/20160509-offshore-database-release.html; https://offshoreleaks.icij.org/nodes/61034; and https://www.icij.org/offshore#_ga=1.183963814.1052794772.1467974903.

[67] See the series of articles by ICIJ on secret deals in Africa, available from https://panamapapers.icij.org/.

[68] On 16 June 2016, The *New York Times* reported that a Mossack employee had been arrested in Geneva as a suspected whistle-blower. See www.counterpunch.org/2016/04/18/panama-and-the-criminalization-of-the-global-finance-system/.

[69] Available from www.ohchr.org/EN/Issues/IntOrder/Pages/IEInternationalorderIndex.aspx.

[70] See www.theguardian.com/world/2016/apr/05/iceland-prime-minister-resigns-over-panama-papers-revelations.

impunity continues. The Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, observed at the end of an official visit to the United States in July 2016 that Wall Street bankers had looted billions of dollars through crooked schemes, devastating the finances of millions of Americans and saddling taxpayers with a massive bailout bill. He noted that as yet, he had not heard any suggestions for a "war on Wall Street theft" (similar to the "war on drugs").[71]

B. Tax havens and corruption

35. In March 2016, the Huffington Post published the results of a months-long investigation into Unaoil, a Monaco-based firm registered in a tax haven, the British Virgin Islands. Unaoil and its subcontractors are reported to have bribed foreign officials to help major multinational corporations win contracts, as tens of thousands of the company's internal documents allegedly show. "The investigation illustrates just how complicit big Western companies are in corruption overseas. It also shows that by enabling corruption, these companies fuel the kind of political instability that allows insurgencies like the self-described Islamic State to grow."[72]

36. The Unaoil bribery scandal reveals systematic bribery by numerous transnational enterprises. Besides issues of corruption, this raises issues of tax evasion, since bribes were presumably not reported or taxed. Where are these moneys harboured? According to the leaked information, government contracts worth billions of dollars were allegedly awarded to the British enterprise Rolls-Royce, the United States multinational Halliburton, the Australian company Leighton Holdings and Republic of Korea corporations Samsung and Hyundai, thanks to bribes paid on behalf of the firms. The Federal Bureau of Investigation, the United States Department of Justice and anticorruption authorities in Australia and the United Kingdom have launched a joint investigation into the "bribes-for-contracts" scandal.

C. The art of creating "unreality": innovative schemes by major accounting firms

37. In November 2014 ICIJ obtained from a source thousands of leaked documents revealing an intricate web of tax avoidance based in Luxembourg.

38. Global auditing firms are the architects of offshore banking. The ICIJ website offers the following account: For more than a decade, PricewaterhouseCoopers helped Caterpillar move profits produced in the United States to a tiny subsidiary in Switzerland. Although parts were shipped from suppliers to the United States and then shipped from the warehouse to independent dealers, the profits were booked by the Swiss subsidiary, which paid corporate taxes of less than 6 per cent a year, far lower than Caterpillar's 29 percent rate in the United States. By 2008, partners at the accounting firm worried that the strategy might be threatened by Caterpillar's decision to move some managers to the United States, a shift that would underline the parts business' small footprint in Switzerland. A PricewaterhouseCoopers

[71] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20317&LangID=E.

[72] See www.huffingtonpost.com/entry/unaoil-scandal-explained_us_56fbd2f0e4b0daf53aec0cff; and www.theguardian.com/business/2016/jul/19/serious-office-opens-criminal-investigation-into-unaoil.

partner who had helped design the tax-savings plan wrote to a colleague that they needed to "create a story" that "put some distance" between the managers and the spare-parts business. The colleague noted that, in any case, both would be retired before the strategy came up for audit. At a hearing before the United States Congress in 2015, Senator Carl Levin criticized the profit-shifting strategy as an exercise in the art of "creating unreality". An investigation revealed that the accounting firm had exploited legal loopholes to help Caterpillar shift $8 billion in paper profits from the United States to Switzerland, reducing the equipment maker's United States tax bill by $2.4 billion.[73]

39. ICIJ goes on to explain how internal company documents in Luxembourg revealed that PwC helped PepsiCo, Ikea and other corporate giants implement abstruse profit-shifting strategies allowing them to slash their tax bills by billions of dollars. Meanwhile, in the United States, authorities were investigating another major accounting firm, KPMG, for promoting offshore tax shelters that created billions of dollars in fake losses and allegedly misled the Internal Revenue Service about the shelters. In New York, another accounting firm, Deloitte, was being investigated for helping a British bank violate sanctions against the Islamic Republic of Iran, submitting a "watered-down" report to regulators.

40. In Dubai, Ernst and Young allegedly helped the largest gold refiner in the Middle East with obscure practices that may violate international standards aimed at combating trafficking in "conflict gold" from regions where competition for the mineral has led to bloodshed.

41. Although KPMG and PwC contend that they have strict codes of conduct for everyone working under their banners worldwide,[74] there seems still to be a very long way to go for accounting firms to understand what ethics, accountability and social justice mean.

42. The issue arises whether Governments see the major accounting firms as they viewed the big banks, "too big to fail". This attitude discourages reform, because partners know that Governments will only go so far in punishing bad behaviour. Most worrisome are revolving door practices and the infiltration of Government by the major auditing firms, which have gained influence and inside knowledge by helping Governments write the laws that establish the offshore system's rules of engagement, and by lobbying heavily to keep the rules to their liking. Austin Mitchell, a former Member of Parliament in the United Kingdom, has gone so far as to call the auditing firms "more powerful than government".[75] Critics contend that executives of the major accounting firms shuttle between the accounting industry and government so often in Europe and other regions that it undermines authorities' efforts to police the industry and enforce tax laws.

[73] See www.icij.org/project/luxembourg-leaks/big-4-audit-firms-play-big-role-offshore-murk.

[74] Ibid.

[75] See www.theaccountant-online.com/features/political-donations-are-a-way-of-influencing-policy-and-buying-influence-austin-mitchell-former-mp-4583932/.

D. LuxLeaks and the protection of whistle-blowers

43. The Luxembourg Leaks investigation is based on a confidential cache of secret tax agreements approved by Luxembourg authorities that provide "tax relief" for more than 350 companies around the world. Although against national and international *ordre public*, the private deals are technically legal in Luxembourg.[76] The fact that the then President of Luxembourg became President of the European Commission in 2014 raises questions as to his commitment to end tax avoidance.[77] Unfortunately, the European Parliament failed to establish a committee of inquiry into the LuxLeaks scandal, as demanded by numerous parliamentarians.[78]

44. The whistle-blowers who revealed the tax abuse were tried in the first half of 2016.[79] On 29 June, two former PricewaterhouseCoopers employees received suspended sentences of 12 and 9 months[80] respectively for leaking documents revealing how Luxembourg granted lucrative tax breaks that saved firms including Apple, Ikea and PepsiCo billions of dollars in taxes.[81] We seem to live in an upside-down world, in which whistle-blowers are convicted and those who loot society are not. Whistle-blowers are heroes of our time, serving society and human rights. It is urgent for parliaments to adopt robust legislation not only to protect whistle-blowers, but also to reward them for contributing to ethics and integrity, especially in a sector where professional secrecy is at a peak.[82]

45. Instead of thoroughly investigating and, where necessary, taking penal measures against those involved in the LuxLeaks scandal, in May 2016 the European Union approved the Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure,[83] which civil society fears may enable lawsuits against journalists, trade unionists or whistle-blowers who publish internal information from a company.[84]

46. Other whistle-blowers involved in litigation are:

- Daniel Schlicksup, whose whistle-blower retaliation suit against Caterpillar in 2012 led to the hearing of the United States Senate Permanent Subcommittee on Investigations on "Caterpillar's Offshore Tax Strategy".
- Bradley Charles Birkenfeld, whose disclosures led to a massive fraud investigation against the Swiss bank UBS and other banks by the United States Government; Mr. Birkenfeld was sentenced to prison in 2009.

[76] See www.icij.org/project/luxembourg-leaks/explore-documents-luxembourg-leaks-database.
[77] See www.theguardian.com/world/2014/dec/14/jean-claude-juncker-luxembourg-tax-deals-controversy.
[78] See www.euractiv.com/section/euro-finance/news/parliament-despondent-after-failure-of-luxleaks-committee/.
[79] See www.transparency.org/news/feature/whats_it_like_to_be_a_whistleblower.
[80] See www.bbc.com/news/world-europe-36662636.
[81] See criticism of the decision by civil society at www.transparency.org/news/pressrelease/transparency_international_condemns_prosecution_and_sentencing_of_luxleaks.
[82] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20212&LangID=E#sthash.vCPeNjq5.dpuf.
[83] See http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:PE_76_2015_INIT&from=EN.
[84] See http://corporateeurope.org/power-lobbies/2016/05/trade-secrets-protection-directive-still-dangerous-freedoms-and-rights.

- Swiss auditor Rudolf Elmer, who has been pursued by Swiss courts, allegedly for breaking Swiss banking secrecy while he was working in the Cayman Islands.
- Stéphanie Gibaud, who worked for UBS in Paris, was harassed and eventually fired after she made allegations about the company. In March 2015 a French labour tribunal ruled that she had been bullied by the bank.
- Rafi Rotem, who exposed a serious case of corruption in the Israeli Tax Authority and was fired.

E. Tax competition and "incentives"

47. Competition among States to see which will tax less can only lead to further impoverishment of States and aggravation of domestic and international inequality.[85] In her report on taxation and human rights (A/HRC/26/28 and Corr.1), the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda, deplored the difficulties in reaching an international agreement on tax cooperation, observing that low-income States and States with high debt levels or loans from international financial institutions had lost sovereignty over their tax policy and that their actions were frequently constrained by powerful countries, international financial institutions and business interests. She noted that tax sovereignty was also undermined by competition for foreign investment between developing countries, creating a "race to the bottom" in terms of both corporate tax rates and incentives, and that many States granted tax incentives to corporations as they competed to attract foreign investment, in particular in the agriculture and mining sectors. She concluded that such incentives warranted a heightened level of scrutiny in human rights terms because they restricted the State's revenue and therefore the resources it was able to devote to the realization of human rights. Losses to developing countries could reach $138 billion per year. The author of the present report concurs, and asserts that such harmful competition must be banned.

48. In 1997 the European Union Economic and Financial Affairs Council (Ecofin) adopted a non-binding Code of Conduct on business taxation,[86] under which States undertake to avoid harmful tax practices. The criteria for what constitutes "potentially harmful tax measures" include tax benefits reserved for non-residents and lack of transparency. However, the Code of Conduct Group refrained from discouraging the use of "sweetheart" deals, and latest data suggest that the use of such arrangements has been increasing. Meanwhile, article 87 of the Treaty establishing the European Community prohibits State aid that threatens to distort the European single market. The application of article 87 was laid out in the "Commission notice on the application of the State aid rules to measures relating to direct business taxation" (1998), according to which actions taken by the member State may be considered State aid if they are specific or selective, rather than general in nature. Moreover, the measure is not required to be a direct subsidy. Paragraph 22 of the notice stipulates: "Every decision of the administration that

[85] OECD, *Harmful Tax Competition: An Emerging Global Issue* (Paris, 1998), pp. 13-14; and Africa Progress Panel, *Equity in Extractives: Stewarding Africa's Natural Resources for All: Africa Progress Report 2013*, p. 65.

[86] See http://ec.europa.eu/taxation_customs/taxation/company_tax/harmful_tax_practices/index_en.htm.

departs from the general tax rules to the benefit of individual undertakings in principle leads to a presumption of State aid and must be analysed in detail." Accordingly, the European Commission has opened investigations into alleged "sweetheart" deals for multinational companies including Apple[87] in Ireland, Starbucks[88] in the Netherlands, Fiat,[89] Amazon.com[90] and McDonald's[91] in Luxembourg.

49. On 11 January 2016, the Commission found that selective tax advantages granted by Belgium under its "excess profit" tax scheme violated European Union State aid rules. The scheme, benefiting at least 35 multinationals, must end and the multinationals must now return unpaid taxes to Belgium. The "excess profit" tax scheme, applicable since 2005, allowed certain multinational group companies to pay substantially less tax in Belgium on the basis of tax rulings which reduced the corporate tax base of the companies by 50-90 per cent, to discount for so-called "excess profits" allegedly resulting from being part of a multinational group. The Commission's in-depth investigation, opened in February 2015, concluded that the scheme had derogated from normal practice under Belgian company tax rules and the so-called "arm's length principle".[92]

50. The above illustrates the widespread nature of the abuse and the necessity of insisting on public country-by-country reporting to display the massive misalignment between business activities elsewhere and profits declared in Belgium, Ireland, Luxembourg, the Netherlands and other countries at advantageous tax rates. The European Parliament has called for the key elements of "sweetheart" deals to be made public, but this proposal has not been endorsed by the European Commission nor by the Council of the European Union.

F. Organization for Economic Co-operation and Development and Directive of the Council of the European Union

51. On 21 June 2016, the Council of the European Union agreed on a draft directive addressing tax avoidance practices commonly used by large companies. The directive is part of a January 2016 package of Commission proposals and builds on 2015 OECD recommendations to address BEPS.[93] The directive has been heavily criticized by civil society: Oxfam has said that Governments have been unable to agree on an effective approach against parking profits in tax havens at a time when repeated tax scandals are calling for immediate and efficient action; what is needed to end tax dodging are rules that require big companies to disclose where they make their profits and where they pay their taxes.[94] In 2015, the Independent Commission

[87] See www.theguardian.com/technology/2016/jan/15/apple-european-commission-ruling-back-taxes-ireland.

[88] See www.theguardian.com/business/2015/oct/21/starbucks-and-fiat-tax-deals-with-eu-nations-ruled-unlawful.

[89] See http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38375.

[90] See http://europa.eu/rapid/press-release_IP-14-1105_en.htm.

[91] See http://europa.eu/rapid/press-release_IP-15-6221_en.htm.

[92] See http://europa.eu/rapid/press-release_IP-16-42_en.htm.

[93] See http://www.consilium.europa.eu/en/press/press-releases/2016/06/21-corporate-tax-avoidance/.

[94] See www.oxfam.org/en/pressroom/reactions/eu-finance-ministers-unwilling-address-tax-avoidance.

for the Reform of International Corporate Taxation issued a declaration in which it expressed reservations concerning the "targeted reforms" of the BEPS system.[95]

G. United Nations Conference on Trade and Development

52. The fourteenth session of the United Nations Conference on Trade and Development (UNCTAD XIV) took place in July 2016. In spite of constructive proposals made by many delegations, the outcome documents failed to give UNCTAD a clear mandate to expand its work on the impacts of taxation and tax avoidance on development. In order to facilitate the achievement of the Sustainable Development Goals and promote a democratic and equitable international order, the mandate of UNCTAD requires strengthening with respect to specific competences concerning international cooperation on taxation, abolishing tax havens, controlling financial flows and providing technical assistance, while ensuring that all States participate on an equal footing in international tax forums. Unfortunately, developed countries blocked relevant proposals.

IV. Good initiatives and practices

53. The Convention on Mutual Administrative Assistance in Tax Matters, the most comprehensive multilateral instrument for tax cooperation, was elaborated by OECD and the Council of Europe in 1988 and amended by Protocol in 2010. The G-20 has consistently encouraged countries to sign the Convention, including most recently at the meeting of the G-20 finance ministers and central bank governors in February 2016.[96] Ninety-eight jurisdictions currently participate in the Convention, representing a wide range of countries including all G-20 countries, the BRICS countries (Brazil, the Russian Federation, India, China and South Africa), all OECD countries, major financial centres and an increasing number of developing countries.

A. A United Nations tax cooperation body

54. Within the United Nations, since 2012 the G-77 and China have proposed that the Committee of Experts on International Cooperation in Tax Matters be transformed into a global, inclusive norm-setting body for international tax cooperation at the intergovernmental level. This idea has been gaining momentum with numerous non-governmental organizations,[97] including Global Alliance for Tax Justice. In preparation for the Third United Nations Conference on Financing for Development, held in Addis Ababa in September 2015, Global Alliance submitted a position paper calling for a global tax body.[98] Following up on the conference, Global Alliance again called for the creation of a global tax body as the most

[95] See www.icrict.org/wp-content/uploads/2015/06/ICRICT_Com-Rec-Report_ENG_v1.4.pdf.

[96] See www.oecd.org/tax/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm.

[97] See https://business-humanrights.org/en/ngos-call-for-greater-representation-of-developing-countries-in-global-tax-talks-emphasise-need-for-un-global-tax-body.

[98] See www.globaltaxjustice.org/sites/default/files/FINAL_GATJ_FFD_position-paper_20March2015.pdf.

effective way to achieve an equitable global tax system, increase domestic resource mobilization and reduce intra-State and inter-State inequality.[99]

55. On 9 June 2016, the President of Ecuador, Rafael Correa, endorsed the proposal to create a world institution to eliminate tax havens, and pledged to make a request to include this important issue in the agenda of the General Assembly agenda and to coordinate with G-77 countries to ban offshore secrecy.[100]

56. Another positive development was the announcement at the United Nations Conference of the Addis Tax Initiative,[101] pursuant to which developing countries will be assisted to build their domestic revenue systems. In the declaration issued by the partners to the Initiative, the participating countries and international organizations affirm that domestic resource mobilization and effective use is the crux of the common pursuit of sustainable development and achieving the Sustainable Development Goals. The partners commit to support countries that need assistance, including by substantially increasing official development assistance and technical assistance to build tax and fiscal management capacity, particularly in least developed countries; moreover, they agree to cooperate to combat tax evasion as well as tax avoidance.

B. Common Reporting Standard

57. Pursuant to the Common Reporting Standard devised by OECD in 2014, automatic exchange of financial account information will take place as of 2017 without the need for the recipient jurisdiction to make a request. In response to the Independent Expert's questionnaire, OECD stated that the impact of the Common Reporting Standard and improved transparency was already apparent, with at least €50 billion in additional revenues identified in countries that had put in place voluntary disclosure programmes and similar initiatives to allow taxpayers to come forward to correct their past tax transgressions. Observers, however, have identified loopholes concerning the high thresholds of ownership that prevent beneficial owners — the true owners of shell corporations — from being identified and the possibility of avoiding the identification of owners who hide behind an "active non-financial entity". Moreover, the Standard explicitly restricts the use of the information received to tax purposes and explicitly prohibits sharing the information with law enforcement authorities. Although OECD clarified that information might be exchanged with other law enforcement agencies if the sending party explicitly agreed, these restrictions might prevent cost-free synergies for fighting corruption and money-laundering.

58. BEPS refers to tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity. Although some of the schemes used are illegal, most are technically legal. BEPS has the potential to solve some aspects of multinational tax avoidance, but hitherto has failed to address key issues that face developing

[99] See www.taxjustice.net/wp-content/uploads/2013/04/GATJ-statement-GlobalTaxBodyPanamaPapers_18Apr2016.pdf.

[100] See www.andes.info.ec/en/news/president-rafael-correa-commits-end-offshore-secrecy.html; and http://www.telesurtv.net/news/Correa-propone-consulta-popular-sobre-paraisos-fiscales-en-Ecuador-20160715-0003.html.

[101] See www.taxcompact.net/documents/Addis-Tax-Initiative_Declaration.pdf.

countries. OECD has also developed an inclusive framework on BEPS. In October 2015, OECD unveiled a campaign to end tax havens and loopholes.[102] It has also developed a model tax convention.[103]

59. In September 2013, G-20 leaders endorsed the comprehensive Action Plan on Base Erosion and Profit Shifting.[104] Two years later, the G-20 proposed reinforced international standards and measures to help countries tackle BEPS. The package provides tools to ensure that profits are taxed where economic activities are performed and where value is created.

60. Speaking in Abu Dhabi on 22 February 2016, IMF Managing Director Christine Lagarde expressed the view that the BEPS project did not go far enough in creating an effective international tax system. She said that while the project had made significant progress, more work needed to be done in terms of both substance and scope. The BEPS rules had been designed to work within the traditional architecture for international taxation, developed nearly a century ago in a world where cross-border trade was less important and consisted almost entirely in physical goods. Today's challenges included the taxation of traded services and the shifting of intellectual property across borders, which was why an international tax system truly fit for the twenty-first century that would work for all economies was needed.[105]

61. On 14 April 2016, Ms. Lagarde advocated the strengthening of international efforts to curtail aggressive tax avoidance, so that the international tax system would no longer have loopholes available for rich people and companies to exploit. A perception that the rules are skewed towards some or do not apply to everyone constitutes a threat to the global economy. She warned that the world could no longer tolerate taxation being treated "as a local matter associated with sovereignty".[106]

62. The European Parliament has launched several initiatives to combat tax evasion,[107] while the European Commission has developed useful indicators to measure aggressive tax planning, including tax exemptions for royalties, advances and similar income derived from patents in respect of inventions, copyright and trademarks.

63. On 21 June 2016, the Special Committee on Tax Rulings II of the European Parliament adopted recommendations including the creation of a European Union public register of beneficial owners of companies, a tax-havens blacklist, sanctions against non-cooperative tax jurisdictions, action against abuse of patent box regimes for intellectual property revenues, a code of conduct for banks and tax advisers, tax good governance rules in all European Union trade agreements and a withholding

[102] See www.telegraph.co.uk/finance/economics/11912495/OECD-unveils-global-push-to-end-tax-havens-and-loopholes.html.

[103] See www.oecd.org/ctp/treaties/2014-model-tax-convention-articles.pdf.

[104] See www.oecd.org/ctp/BEPSActionPlan.pdf.

[105] See www.publicfinanceinternational.org/news/2016/02/international-tax-reforms-do-not-go-far-enough-says-lagarde.

[106] https://next.ft.com/content/9ce6c362-0262-11e6-af1d-c47326021344 (subscription required).

[107] See www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT%20REPORT%20A7-2013-0162%200%20DOC%20XML%20V0//EN.

tax on profits leaving the Union.[108] The European Parliament approved the recommendations on 6 July 2016.[109]

64. In order for Governments to be able to fund Sustainable Development Goals and deliver on their human rights obligations to provide public health care, education, water and sanitation, affordable housing and transportation, all countries must have an equal seat at the table to determine equitable international tax practices.

C. A financial transactions tax

65. In the *World Economic and Social Survey 2012*, titled *In Search of New Development Finance*, the United Nations proposed an international tax, combined with other innovative financing mechanisms, to raise more than $400 billion annually for development and global challenges such as fighting climate change.[110]

66. In October 2012, Christine Lagarde said that a financial transactions tax was a step in the right direction.[111] According to the Centre for Economic and Policy Research,[112] a set of scaled transactions taxes, imposed on transfers of stock and other financial assets, could raise more than $100 billion a year. This revenue could be used for environmental protection and sustainable development worldwide. Although there is growing momentum,[113] such a "Tobin tax" is far from being adopted.[114]

D. Development agenda of the United Nations Conference on Trade and Development

67. The *World Investment Report 2015: Reforming International Investment Governance* devotes an entire chapter to international tax and investment policy coherence. Awareness of the problems, however, is only a first step towards solving them. UNCTAD observes:

> Tax avoidance and the lack of transparency in international financial transactions are global issues that require a multilateral approach, with adequate developing-country participation ... International cooperation is fundamental to prevent harmful tax competition; competition to attract investment should not lead to a race to the bottom. International cooperation is also important for the success of transparency initiatives, such as the Extractive Industries Transparency Initiative. ... Such initiatives should ideally not focus only on governments, but also on companies.

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[108] See www.europarl.europa.eu/news/en/news-room/20160621IPR33011/MEPs-call-for-tax-haven-black-list-patent-box-rules-CCCTB-and-more.

[109] See http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0310+0+DOC+XML+V0//EN&language=EN#BKMD-14.

[110] See www.un.org/en/development/desa/news/policy/wess2012.html; and www.un.org/esa/ffd/wp-content/uploads/2012/03/2011esm_NGO1.pdf.

[111] See http://robinhoodtax.org.uk/content/response-imf-chief-christine-lagarde-supporting-financial-transaction-tax.

[112] See http://cepr.net/documents/publications/financial-transactions-tax-2008-12.pdf.

[113] See http://cepr.net/documents/Support_for_FTT_09-14.pdf.

[114] See http://mondediplo.com/2016/05/08tobin.

68. The report further states that "tax avoidance practices are responsible for a significant leakage of development finance resources. An estimated $100 billion of annual tax revenue losses for developing countries is related to inward investment stocks directly linked to offshore hubs." Oxfam has adopted this figure as the estimated loss for developing countries as a result of corporate tax dodging. For the purpose of its research, UNCTAD identifies offshore investment hubs with reference to the OECD 2000 list of tax havens, plus jurisdictions that offer special purpose entity. IMF defines special purpose entities as "autonomous legal entities, directly or indirectly wholly foreign owned, that are part of a group of companies, without substantial real economic links with the host economy, engaged in a variety of cross-border financial activities, which are aimed at the passing through of all types of financial and non-financial assets, liabilities and related income to third countries". They include Austria, Hungary, Luxembourg and the Netherlands, with the latter two accounting for the bulk of transit foreign direct investment. UNCTAD recognizes that the list of jurisdictions publishing special purpose entity investment data is increasing rapidly.[115]

69. At UNCTAD XIV, delegations prevented a neoliberal takeover of the future UNCTAD agenda and succeeded in including useful language in the outcome document:[116]

> Given growing concerns about external debt sustainability, public debt management to prevent and pre-empt financial and debt crises is important. The need for a central data registry, including information on debt restructuring, has also been recognized. In this regard, the longstanding work of UNCTAD on debt issues within the United Nations, including through promotion of its Principles on Promoting Responsible Sovereign Lending and Borrowing, is recognized. The work of the United Nations, the International Monetary Fund and the World Bank remains important.
>
> ...
>
> Effective taxation will be critical in the mobilization of resources for implementation of the Sustainable Development Goals and overall economic advancement of developing countries. This includes reducing opportunities for tax avoidance, as well as addressing illicit financial flows and the activities that underlie their occurrence, such as tax evasion, illegal exploitation of natural resources, corruption, embezzlement and fraud. This is a global issue that requires further multilateral cooperation. Current initiatives should also be more inclusive with regards to the participation of developing countries.

[115] See http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf.

[116] The text quoted is from the final agreed negotiated text of the consensus document (Nairobi Maafikiano), chap. I, sect. A, sub-theme 1, Challenges and opportunities in multilateralism for trade and development. As of the date of submission of the present document, the final report of the conference had not been issued.

E. International Monetary Fund: change of mindset?

70. A recent paper by IMF economists Jonathan Ostry, Prakash Lougani and Davide Furceri[117] and statements by Christine Lagarde[118] give reason for hope that international organizations like IMF can gradually abandon neoliberal mantras and start applying a human rights-based approach to their short-, medium- and long-term programmes. It is obvious that capital inflows in the form of portfolio investment and banking and speculative debt influxes do not boost growth and put populations at risk. Capital account liberalization has given way to the recognition that capital controls are needed to deal with the volatility of capital flows.

F. Taxes and military expenditures

71. As the Independent Expert substantiated in his 2014 report to the Human Rights Council (A/HRC/27/51), lobbies for the military-industrial complex exercise an undemocratic influence on parliaments and many countries devote an unconscionably high percentage of the discretionary budget to military-related activities. Bearing in mind that article 18 of the International Covenant on Civil and Political Rights recognizes the right to conscientious objection to war, the question arises whether individuals have a right to withhold taxes that are used for war or military research, e.g., for lethal autonomous weapons systems.[119] A parliamentary bill in the United Kingdom aims at recognizing the right of individuals to opt out of war for moral reasons and to opt out of paying taxes for war, since through taxes they would be financing what they deem immoral. If Governments were to recognize this right and devote the taxes of conscientious objectors to conflict-prevention measures, this would be a significant step for civilization.[120]

V. Conclusions

72. **Tax avoidance, tax evasion and tax havens deprive countries of revenue needed to fulfil human rights treaty obligations, alleviate poverty, improve the administration of justice, ensure that remedies a.. available to victims of human rights violations, build infrastructures, create jobs and provide social security, quality health services and free education.**

73. **Because the tax activities of domestic and transnational corporations have significant direct and indirect socioeconomic impacts, a binding legal instrument on corporate social responsibility[121] stipulating the obligation to pay taxes where the profits are generated and a prohibition on shifting profits**

[117] See www.imf.org/external/pubs/ft/fandd/2016/06/ostry.htm.

[118] See www.imf.org/en/News/Articles/2015/09/28/04/53/sp041116, www.imf.org/en/News/Articles/2015/09/28/04/53/sp040516; and www.imf.org/en/News/Articles/2015/09/28/04/53/sp011216.

[119] See www.unog.ch/80256EE600585943/(httpPages)/37D51189AC4FB6E1C1257F4D004CAFB2.

[120] See www.conscienceonline.org.uk/wp-content/uploads/2016/06/Taxes-for-Peace-Bill-2016.pdf. "Every gun that is made, every warship launched, every rocket fired signifies, in the final sense a theft from those who hunger and are not fed, those who are cold and are not clothed. This world in arms is not spending money alone. It is spending the sweat of its labourers, the genius of its scientists, the hopes of its children. Dwight D. Eisenhower"

[121] See Human Rights Council resolution 26/9; and www.globalreporting.org/Pages/FR-CSX-2016.aspx.

should be adopted. This would encourage responsible tax behaviour that does not harm global financial stability, development and human rights.

74. **While the end of tax havens is not in sight, Governments are gradually coming to realize that it is in their own interest to phase out secrecy jurisdictions. An international tax convention is necessary to stop competition among tax jurisdictions and abolish secrecy.**

75. **Taxation should be used to advance human rights. Fiscal and budgetary policy should be reformed with a view to achieving fair taxation by abolishing tax havens and "sweetheart" deals, closing loopholes and rejecting *contra bonos mores* schemes and abuse of rights.[122] Progressive redistributive taxation polices will produce funding for vital public services that will reduce inequality and poverty and lead to sustainable development.**

VI. Recommendations

76. **Bearing in mind that taxation has an impact on human rights and on the international order, the Independent Expert suggests the following action plan:**

77. **States should:**

(a) **Establish an intergovernmental tax body under the auspices of the United Nations with the mandate to elaborate a United Nations convention on taxation and international cooperation in tax matters;**

(b) **Adopt a common United Nations standard for multilateral and automatic exchange of tax information;**

(c) **Implement corporate tax and financial transparency, including public registries of ultimate beneficial ownership;**

(d) **Ensure that multinational corporations are treated as single entities conducting business across international borders;**

(e) **Enact legislation requiring country-by-country reporting and automatic and multilateral exchange of financial information, so as to reveal the misalignment between where business activity takes place and where profits**

[122] "The doctrine of abuse of rights (or *abus de droit*) is one of the many outgrowths of the legal principle of good faith." Sir Robert Jennings, ed., *Oppenheim's International Law*, 9th ed., p. 407. "The doctrine prevents a Party to an agreement from exercising its rights in a way that is unreasonable in the light of the spirit of the agreement. Used frequently in international courts, the idea behind the abuse of rights doctrine is being increasingly recognized as a norm of international law." According to Sir Hersch Lauterpacht, the concept of abuse of rights is present in most developed legal systems and "it is only at a rudimentary stage of legal development that society permits the unchecked use of rights without regard to its social consequences". *The Development of International Law by the International Court* (1958), p. 162. See also Lauterpacht, *The Function of Law in the International Community* (1933), chap. 14 and a review of the 2011 republication of this work by Isabel Feichtner in *European Journal of International Law*, vol. 22, No. 4 (2011), pp. 1177-1179; G.D.S. Taylor, "The content of the rule against abuse of rights in international law", *British Yearbook of International Law*, vol. 46 (1972-1973), also citing Lauterpacht; and Alexandre Kiss, "Abuse of rights" in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. I (2012), pp. 20-26.

are declared and tax paid. Data should be made fully public so that citizens can hold multinationals and tax authorities to account;

(f) Abolish "sweetheart" tax deals; States members of the European Union should revise the Code of Conduct on business taxation to specifically prohibit "sweetheart" deals;

(g) Conduct systematic human rights impact assessments to monitor the spillover effects of their tax policies and agreements domestically and overseas. These should be periodic and independently verified;

(h) Impose criminal penalties for abusive tax practices and abolish tax amnesties;

(i) Enact legislation to protect whistle-blowers and witnesses, and ensure that individuals who want to share information about corporate tax practices which harm human rights are not prosecuted or subjected to reprisals; States should cease punishing individuals for disclosing information that the public has a right to receive pursuant to article 19 of the International Covenant on Civil and Political Rights. A charter on the rights of whistle-blowers and a "protected disclosure defence" should be adopted, pursuant to which criminal or civil liability for protected disclosures is waved and an "authorized channel" is provided for such disclosures;

(j) Introduce a financial transactions tax and enforce it;

(k) Pursue efforts to collect taxes, imposing fines on tax evaders, and use the revenue to fulfil human rights treaty obligations, in particular the administration of justice, health and education. States should cease imposing "austerity measures" in the social sector and exercise austerity with regard to military expenditures;

(l) Agree on a minimum corporate tax rate and curb tax competition among countries, acknowledging that this policy facilitates corruption, bribery and money-laundering;

(m) Audit banks, law firms and accounting and consulting firms that specialize in establishing anonymous, shell or mailbox companies that serve no purpose other than to avoid taxes;

(n) Test the inter-State complaints procedure under article 41 of the International Covenant on Civil and Political Rights and article 10 (1) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, e.g., concerning the extraterritorial liability of States for the activities of transnational corporations and banks, in particular concerning the loss of tax revenues through the operation of tax havens. These matters should be systematically reviewed when State party reports are examined.

78. Parliaments should:

(a) Exercise their oversight functions concerning the human rights impacts of fiscal policies and the domestic and extraterritorial effects of tax havens;

(b) **Proactively inform their constituents of the aims and consequences of fiscal policies and endeavour to achieve tax justice domestically and internationally;**

(c) **Adopt robust legislation to protect whistle-blowers and witnesses from harassment and/or prosecution.**

79. **The General Assembly should:**

(a) **Revise the Guiding Principles on Business and Human Rights and support the adoption of a legally binding instrument on corporate social responsibility prohibiting "aggressive tax avoidance", tax fraud, tax evasion and tax havens;**

(b) **Refer relevant legal questions to the International Court of Justice for advisory opinions.**

80. **UNCTAD should develop a strategy to protect the policy space of States in controlling capital flows, in particular to curb and criminalize illicit financial flows and the flight of moneys to tax havens, in cooperation with the Office of the United Nations High Commissioner for Human Rights and the United Nations Office on Drugs and Crime.**

81. **OECD should facilitate the sharing of information collected under CRS by the recipient jurisdiction with other relevant government authorities to tackle corruption and money-laundering.**

82. **The International Monetary Fund, the World Bank and central banks should refuse loans to countries that harbour tax havens. No project should be subsidized if the enterprises involved use secrecy jurisdictions.**

83. **Domestic banks should investigate the origin of the deposits and investments they administer and return illicit funds held by corporations and kleptocrats to the countries of origin.**

84. **The International Court of Justice should issue an advisory opinion holding that tax havens are *contra bonos mores* and against international *ordre public*.**

85. **Members of civil society should:**

(a) **Demand more direct democracy in matters such as taxation. They should demand participatory democracy and expose so-called "representative democracy" when it ceases to represent the voice of the people and becomes subservient to corporate lobbies;**

(b) **Demand referendums on important issues, including a financial transactions tax, the outlawing of tax havens and runaway military expenditures;**

(c) **Demand a reduction of military expenditures. Bearing in mind that article 18 of the International Covenant on Civil and Political Rights protects the right of conscientious objection, this right should also shield citizens from prosecution if they engage in peaceful civil disobedience and refuse to contribute to the arms race and to governmental activities that threaten article 6 of the International Covenant on the right to life, and violate article 20 (1) of**

the International Covenant, which prohibits propaganda for war. Conscientious objectors should insist that their taxes be used for conflict-prevention policies;

(d) International non-governmental organizations such as Amnesty International, Human Rights Watch, International Service for Human Rights and International Federation for Human Rights should add tax fairness and the abolition of tax havens to their urgent goals.

86. **Law schools and business schools should:**

(a) Include ethics and corporate social responsibility as obligatory disciplines in their curricula. Bar associations should test candidates thereon. The legal profession must not be silent when members of the bar seriously undermine social policies by creating fraudulent companies and other schemes for tax avoidance purposes;

(b) Instil a sense of responsibility in students as prospective lawyers and business executives. They must be taught that they have a duty to serve society and to promote human rights. Teaching "aggressive tax avoidance" is unethical. Students must understand the difference between legitimate profit and looting of society.

VII. Postscript

87. The Independent Expert thanks Governments, intergovernmental organizations, non-governmental organizations, academia and experts for their insightful answers to his questionnaires, and reiterates his appreciation to the committed, hard-working and competent secretariat of the Office of the United Nations High Commissioner for Human Rights. The General Assembly should allocate considerably greater resources to the Office, the Human Rights Council and its special procedures, the treaty bodies and UNCTAD.

Annex

Tax Justice Network secrecy index ranking, 2015[a]

1. Switzerland
2. Hong Kong, China
3. United States of America
4. Singapore
5. Cayman Islands*
6. Luxembourg
7. Lebanon
8. Germany
9. Bahrain
10. United Arab Emirates (Dubai)
11. Macao, China
12. Japan
13. Panama
14. Marshall Islands
15. United Kingdom of Great Britain and Northern Ireland

* British Overseas Territory. If the United Kingdom and its Overseas Territories and Crown Dependencies were assessed together, it would be at the top.

[a] See www.financialsecrecyindex.com/.